

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANTONINA RYMARUK,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner,
Social Security Administration,

Defendant.

Case No. C04-01658-MJP

REPORT AND RECOMMENDATION

Plaintiff Antonina Rymaruk proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (the "Commissioner"). The Commissioner denied Plaintiff's application for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act after a hearing before an Administrative Law Judge ("ALJ"). For the reasons set forth below, it is recommended that the final decision of the Commissioner be affirmed and the appeal be dismissed.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a 55-year-old Ukrainian immigrant who has a high school education, but is unable to speak or read English. AR. at 18, 57, 130, 308-09. She last worked in 1990 in Ukraine. AR. at 70. On February 27, 2001, plaintiff applied for SSI benefits (AR. at 55-74), alleging disability stemming from migraine headaches, dizziness, high blood pressure, heart problems, and arthritis. AR. at 92. Her application was denied upon initial and reconsidered determinations.

01 AR. at 25-31. Following a hearing before an ALJ, the plaintiff was found not disabled under the
02 Social Security Act because she was capable of performing past relevant work. AR. at 17-24.
03 The Appeals Council denied plaintiff's request for review, leaving the ALJ's decision as the
04 Commissioner's final decision in this case. AR. at 5-8, 11-12.

05 Pending the appeal of that hearing, plaintiff reapplied for SSI benefits and began receiving
06 them on January 9, 2004. She continues to receive SSI benefits today. Plaintiff seeks reversal of
07 the September 29, 2003, unfavorable ALJ decision and payment of back benefits for the period
08 of February 27, 2001, through September 29, 2003. Pl. Rply. Br. (Dkt. No. 26) at 2.

09 II. JURISDICTION

10 This Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

11 III. STANDARD OF REVIEW

12 The district court may set aside the Commissioner's denial of social security benefits when
13 the ALJ's findings are based on legal error or not supported by substantial evidence in the record
14 as a whole. *See* 42 U.S.C. § 405(g); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996)
15 (internal citations omitted). Substantial evidence is defined as more than a mere scintilla but less
16 than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate
17 to support a conclusion. *Smolen*, 80 F.3d at 1279. The ALJ is responsible for determining
18 credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v.*
19 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one
20 rational interpretation, it is the Commissioner's conclusion that must be upheld. *Thomas v.*
21 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (quoting *Smolen*, 80 F.3d at 1292).

22 The Court has discretion to remand for further proceedings or to award benefits. *See*
23 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
24 where "the record has been fully developed and further administrative proceedings would serve
25 no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

01 Such a circumstance arises when: (1) the ALJ has failed to provide
02 legally sufficient reasons for rejecting the claimant's evidence; (2) there
03 are no outstanding issues that must be resolved before a determination of
04 disability can be made; and (3) it is clear from the record that the ALJ
would be required to find the claimant disabled if he considered the
claimant's evidence.

05 *Id.* at 1076-77.

06 IV. EVALUATING DISABILITY

07 The claimant bears the burden of proving that she is disabled within the meaning of the
08 Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined
09 as the "inability to engage in any substantial gainful activity by reason of any medically
10 determinable physical or mental impairment, which can be expected to result in death, or which
11 has lasted or can be expected to last for a continuous period of not less than twelve months[.]"
12 42 U.S.C. § 423(d)(1)(A). A claimant is disabled only if her impairments are of such severity that
13 she is not only unable to do her previous work, but cannot, considering her age, education, and
14 work experience, engage in any other substantial gainful activity existing in the national economy.
15 *See* 42 U.S.C. §§ 423(d)(2)(A), 1382(c)(a)(3)(B); *See also Tackett v. Apfel*, 180 F.3d 1094, 1098
16 (9th Cir. 1999).

17 The Social Security regulations set out a five-step sequential evaluation process for
18 determining whether a claimant is disabled within the meaning of the Social Security Act. *See* 20
19 C.F.R. §§ 404.1520, 416.920. At step one, the claimant must establish that she is not engaging
20 in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the claimant does
21 so, then at step two, the claimant must establish that she has one or more medically severe
22 impairments or combination of impairments that limit her physical or mental ability to do basic
23 work activities. If the claimant does not have such impairments, she is not disabled. 20 C.F.R.
24 §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner
25 moves to step three to determine whether the impairment meets or equals any of the listed
26

01 impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant who
02 meets one of the listings for the required twelve-month duration requirements is disabled. *Id.*

03 When the claimant's impairment neither meets nor equals one of the impairments listed in
04 the regulations, the Commissioner must proceed to step four and evaluate the claimant's residual
05 functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the Commissioner
06 evaluates the physical and mental demands of the claimant's past relevant work to determine
07 whether the claimant can still perform that work. *Id.* If the claimant is not able to perform her
08 past relevant work, then the burden shifts to the Commissioner at step five to show that the
09 claimant can perform some other work that exists in significant numbers in the national economy,
10 taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
11 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1099-100. If the Commissioner finds the claimant
12 is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

13 V. DECISION BELOW

14 On September 29, 2003, the ALJ issued his decision, finding:

- 15 1. The plaintiff had not engaged in substantial gainful activity since
16 the alleged onset of disability.
- 17 2. The plaintiff's migraine headaches constituted a severe impairment.
- 18 3. The impairment did not meet or medically equal one of the listed
19 impairments in 20 C.F.R. § 416.920(c).
- 20 4. The plaintiff's allegations regarding her limitations were not totally
21 credible.
- 22 5. The plaintiff had residual functional capacity to perform light work.
- 23 6. The plaintiff's past relevant work as a telephone operator in Russia did not
24 require the performance of work-related activities precluded by her
25 residual functional capacity.
- 26 7. The plaintiff's migraine headaches did not prevent the plaintiff from
performing her past relevant work.
8. The plaintiff was not under a "disability" as defined by the Social Security
Act, at any time through the date of the decision.

01 AR. 23.

02 VI. ISSUES ON APPEAL

03 A. Did the ALJ err by finding that the plaintiff had residual functional capacity to
04 perform light work or to perform her last relevant work?

05 B. Did the ALJ err by rejecting or by failing to give proper weight to certain evidence?

06 C. Did the ALJ err by failing to call the vocational expert who was present at the
07 hearing but not called to testify?

08 VII. DISCUSSION

09 A. *Substantial evidence exists in the record supporting the finding that the*
10 *plaintiff had residual capacity to perform light work and her past relevant*
work.

11 In this case, Ms. Rymaruk's medical issues consisted of migraine headaches, depression
12 with fatigue, dizziness, high blood pressure, and arthritic joint pain. AR. 92. The ALJ heard from
13 the plaintiff and her daughter, and reviewed medical reports and evaluations from Drs. Tribble,
14 Caratao, Virji, and Smith. On issues other than migraine headaches, the ALJ also considered
15 medical reports and evaluations from Drs. Quint and Shu, and R. Eisenhauer, a psychologist. The
16 ALJ concluded that the plaintiff's migraine headaches were the only impairments that qualified as
17 a severe impairment for SSI purposes. AR. 20. Plaintiff does not appear to challenge this
18 determination.

19 Step four of the sequential evaluation process requires an ALJ to evaluate a claimant's
20 RFC to determine if she retains residual functional capacity to return to her past relevant work and
21 determine whether she can still perform that prior work. 20 C.F.R. §§ 404.1520(e), 416.920(e).
22 Prior work in a foreign country is relevant for this determination unless the claimant shows that
23 such work was less strenuous than in the United States. *Quang Van Han v. Bowen*, 882 F.2d
24 1453, 1457-58 (9th Cir. 1989).

01 Plaintiff argues that the ALJ erred by finding that she performed the job of telephone
02 operator, as defined by the Department of Labor's *Dictionary of Occupational Titles*, and that she
03 performed the job of messenger on a reliable and consistent basis. Dkt. No. 9 at 10.

04 In her application, which is in English, the plaintiff identified her former work from 1985
05 until 1990 as a telephone operator. AR. 83. Although the plaintiff's brief argues that the
06 information on the application was inaccurate and incomplete due to language differences, the
07 finding reached by the ALJ was consistent with testimony that Ms. Rymaruk provided at the
08 hearing with the benefit of an interpreter. Plaintiff testified that she answered telephones and
09 served as a messenger in Russia and that this work approached a full-time basis. AR. at 311-15.
10 This job involved answering a single telephone and relaying messages by foot to different portions
11 of the farm. *Id.* Other evidence in the record is also generally consistent with this determination.
12 AR. at 86, 93, 120, 152. Plaintiff, however, also testified that her boss in Ukraine allowed her to
13 rest when needed and that she ultimately went on Ukrainian disability before emigrating to the
14 United States. AR. at 313-16.

15 The ALJ determined plaintiff's prior jobs were similar to the U.S. job of telephone
16 operator, which is usually classified as "sedentary" under the *Dictionary of Occupational Titles*.
17 AR. 22-23. In addition, the plaintiff's description of her walking to deliver messages would
18 increase the exertional demand to, at most, the "light work" level of exertional demands, similar
19 to work as a messenger. *Id.*

20 On January 31, 2000, Dr. Tible assessed the migraine headaches as a "moderate
21 impairment" and concluded that Ms. Rymaruk was qualified to perform "light work." Dr. Tible
22 also concluded that a treatment plan would likely restore the plaintiff's ability to perform at least
23 half-time in a normal day to day setting. AR. 131-32. Dr. Tible subsequently submitted a
24 statement dated July 29, 2002, in which she concluded that Ms. Rymaruk's headaches would limit
25 her ability to work or to look for full-time work, discussed more fully below. AR. 257. On
26 March 27, 2003, Dr. Tible submitted another statement, indicating that Ms. Rymaruk had an

01 impairment that limited her ability to work or look for full-time work that would last thirty to
02 ninety days if she followed recommended treatment. Dr. Tibble also indicated that Ms. Rymaruk
03 could not pursue job search activities or work while in treatment, and stated “UNK” as an answer
04 to when she would be able to resume at least part-time work. Dr. Tibble noted that Ms. Rymaruk
05 suffered daily migraines, but answered “NO” as to whether Ms. Rymaruk should pursue long term
06 disability benefits such as SSI. AR. 236-38.

07 On December 19, 2001, Dr. Caratao also assessed the plaintiff’s migraine headaches as
08 a “moderate impairment,” but stated that the plaintiff would be limited to “sedentary work,” and
09 that she would be unable to perform at least half-time work in a normal day for at least twenty
10 weeks. When asked whether treatment was likely to restore the plaintiff’s ability to perform at
11 least half-time in a normal day-to-day setting, Dr. Caratao wrote “in doubt.” AR. 168-69.

12 Drs. Virji and Smith, both State Agency medical consultants, reviewed the medical
13 evidence and concluded that Ms. Rymaruk was capable of performing light work. AR. 25, 27,
14 170-75.

15 Thus, although the evidence is in conflict, substantial evidence (defined as more than a
16 “mere scintilla but less than a preponderance,” *Smolen*, 80 F.3d at 1279) exists to support the
17 ALJ’s finding that plaintiff had the residual capacity to perform “light work” and that her former
18 job correlated to the “sedentary” level, or at the maximum, to the “light” level, unless other
19 evidence, including the testimony of the plaintiff and her daughter, and subsequent medical
20 reports, compels a contrary conclusion and was erroneously discredited by the ALJ.

21 *B. The ALJ did not err with respect to credibility assessments of the*
22 *plaintiff or weight accorded to the testimony of the plaintiff’s*
daughter.

23 Plaintiff argues that the ALJ erroneously rejected “entire categories of evidence” by
24 discounting her testimony and testimony given by her daughter. Dkt. No. 19 at 10-11. She
25 asserts that the ALJ’s rejection of this testimony was based on bias and stereotyping. Dkt. No.
26

19 at 10-11. Defendant responds that the ALJ gave numerous clear and convincing reasons for disbelieving plaintiff's testimony. Dkt. No. 25 at 12.

1. Plaintiff's Testimony.

According to the Commissioner's regulations, a determination of whether to accept a claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. § 404.1529; SSR 96-7p, 1996 WL 374186 (S.S.A.) First, the ALJ must determine whether there is a medically determinable impairment that could reasonably be expected to cause the claimant's symptoms. 20 C.F.R. § 1529(a) and (b); SSR 96-7p, at *2. Next, the ALJ must evaluate the intensity and persistence of the claimant's symptoms, using seven factors laid out in SSR 96-7p.¹ 20 C.F.R. § 1529(c); SSR 96-7p, at *2. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms merely because the symptoms are unsupported by objective medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (internal citations omitted) (en banc). Absent affirmative evidence showing that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Id.*; see also *Smolen*, 80 F.3d at 1283-84. In presenting these reasons, the ALJ must specifically identify what testimony is not credible and what evidence undermines the claimant's complaints; general findings are insufficient. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996).

The ALJ provided specific clear and convincing reasons for disbelieving plaintiff's testimony due to inconsistencies in the record. The ALJ noted that plaintiff first reported positive

¹SSR 96-7p lists at least seven factors that an adjudicator must consider when assessing the credibility of an individual's statements. They include (1) the individual's daily activities; (2) the location, duration, frequency, and intensity of the individual's pain or other symptoms; (3) factors that precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; (5) treatment, other than medication, the individual receives or has received for relief of pain or other symptoms; (6) any measures other than treatment the individual uses or has used to relieve pain or other symptoms [. . .]; and (7) any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms. SSR 96-7p at *3.

01 results from her migraine medication, but a year later said they were not working. AR. at 21. He
02 also noted that there was no evidence that plaintiff followed through on her neurologist's 2001
03 referral to a pain clinic and that she never returned to her neurologist. *Id.* He also noted that in
04 at least one instance, she began suffering a headache on Friday but waited until Tuesday to take
05 her pain-reducing medication. *Id.* After she took the medication, the headache went away. *Id.*
06 After identifying these, and other reasons, he hypothesized that plaintiff's application was
07 motivated by a pending disqualification from other assistance. *Id.* He then added that "[t]he lack
08 of motivation to work combined with the secondary gain motivation for benefits raises further
09 credibility concerns[]" and determined plaintiff to be "not entirely credible." *Id.* Taken together,
10 these reasons satisfy the ALJ's obligation to provide specific examples of a clear and convincing
11 nature for discounting plaintiff's testimony, and his credibility determination is therefore binding
12 upon this Court. *Morgan v. Commissioner*, 169 F.3d 595, 599 (9th Cir. 1999).

13 2. Daughter's Testimony.

14 In order to determine whether a claimant has an impairment, an ALJ may also consider
15 lay witness sources, such as testimony from family members. 20 C.F.R. § 404.1513(d)(4). Lay
16 witness testimony as to a claimant's symptoms or how an impairment affects ability to work is
17 competent evidence, 20 C.F.R. § 404.1513(e), *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th
18 Cir.1987), and therefore *cannot* be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d
19 915, 918-19 (9th Cir. 1993). If an ALJ wishes to discount the testimony of a lay witness, he must
20 provide reasons germane to each witness and may not simply categorically discredit the testimony.
21 *Id.* Identifying inconsistencies between such statements and the record when looked at as a whole
22 is sufficient. *Lewis v. Apfel*, 236 F.3d 503, 510-12 (9th Cir. 2001).

23 Citing *Smolen*, 80 F.3d at 1288-89, the plaintiff asserts that the ALJ erred by summarily
24 rejecting the testimony of her daughter, Valentine Rymaruk. In *Smolen*, the Ninth Circuit held
25 it was error to categorically reject family testimony as biased, because family members would
26 often be in the best position to observe the needs and disabilities of other family members.

01 *Smolen*, however, does not stand for the proposition that family member testimony must be
02 accorded dispositive weight.

03 In this case, the ALJ gave the testimony of plaintiff's daughter, Valentine Rymaruk, only
04 limited weight. AR. 22. Valentine Rymaruk testified that she did all of the cooking and cleaning
05 in the home and had done so for at least five years. AR. at 327-28. She also testified that she had
06 observed the debilitating effects of her mother's migraines and that they could occur as many as
07 four times per week. AR. at 327. The ALJ indicated that this testimony was given "limited"
08 weight because it conflicted with plaintiff's earlier statements to two different doctors that she
09 performed housework when she did not have headaches and that she enjoyed doing so. AR. at
10 21, 134, 151-52. He also noted that Valentine's observations of her mother were necessarily
11 limited because, though she lived at home, she attended college. AR. at 21. Finally, the ALJ also
12 noted that she could be influenced by a feeling of need to help her family obtain benefits. *Id.* The
13 foregoing reasons are germane to the credibility determinations and the weight to be accorded to
14 the testimony. The ALJ did not err with respect to the weight to be given to the testimony of the
15 plaintiff and her daughter.

16 *C. The ALJ did not erroneously weigh or reject evidence from Drs. Tible and Caratao.*

17 Plaintiff argues that the ALJ erred by failing to provide clear and convincing reasons for
18 disregarding the medical opinions of Drs. Caratao and Tible, two of her treating physicians. Dkt.
19 No. 19 at 12-13. The Commissioner responds that the ALJ was required to provide only specific
20 and legitimate reasons for disregarding the opinions and that the ALJ met that burden. Dkt.
21 No. 25 at 6-8.

22 Because treating physicians are employed to cure and thus have a greater opportunity to
23 know and observe the patient as an individual, their opinions are given greater weight than the
24 opinions of other physicians. *Rodriguez v. Bowen*, 876 F.2d 759, 761 (9th Cir. 1989). A treating
25 physician's opinion, however, is not necessarily conclusive as to either a physical condition or the
26 ultimate issue of disability. *Id.* at 761-62 & n.7. The ALJ may disregard the treating physician's

01 opinion whether or not that opinion is contradicted. *Magallanes*, 881 F.2d 742, 751 (9th Cir.
02 1989) (internal citations omitted).

03 Where a treating physician's opinion is not contradicted by another physician, it may be
04 rejected only for "clear and convincing" reasons supported by substantial evidence in the record.
05 *Reddick*, 157 F.3d at 725. An ALJ must defer to a treating physician's opinion, even if
06 controverted by other medical opinions, unless the ALJ provides specific and legitimate reasons
07 based on substantial evidence in the record. *Magallanes*, 881 F.2d at 751; *Murray v. Heckler*, 722
08 F.2d 499, 502 (9th Cir. 1983). The ALJ can meet this burden by setting out a detailed and
09 thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof
10 and making findings." *Magallanes*, 881 F.2d at 751. An ALJ may, however, reject medical
11 opinions based upon check-the-box type reports that lack a narrative explanation for their
12 conclusions. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (internal citations omitted). The
13 court's main concern in connection with this inquiry centers around the search for specific
14 justifications and rationale for a conclusion, as opposed to conclusory statements or a mere
15 reiteration of a claimant's subjective complaints. *Id.* Courts are not obligated to accept any
16 treating physician's opinion that is brief and conclusory in form and that offers few clinical findings
17 to support its conclusions. *Magallanes*, 881 F.2d at 751.

18 1. Dr. Tible.

19 In this case, the ALJ accepted Dr. Tible's 2000 report, AR 131-32, to support his finding
20 that the plaintiff could perform "light" work, but discounted her 2002 and 2003 evaluations that
21 indicated plaintiff would not be capable of pursuing work for up to a year in the case of the 2002
22 report, and for at least thirty to ninety days in the case of the 2003 report. AR. at 20, 236-38, 257.
23 The ALJ justified this decision by noting that Dr. Tible's 2000 report rated Ms. Rymaruk's
24 migraines as only "moderate." The ALJ also found that Dr. Tible's "light work" capacity rating
25 in the 2000 report was consistent with Ms. Rymaruk's daily activities of tending to children,
26 cooking, and laundry. AR. 20.

01 The ALJ discounted the subsequent 2002 and 2003 reports from Dr. Tible. He reasoned
02 that Dr. Tible's subsequent opinions were little more than check-the-box forms that contained
03 virtually no explanation for their findings. He also noted that the opinion seemed to rely primarily
04 on plaintiff's own subjective complaints, which he believed were suspect, and were inconsistent
05 with both the findings in the original report and the daily activities of the plaintiff. AR. at 20. In
06 addition, he found other nonexamining medical opinions supporting Dr. Tible's initial opinion.
07 AR. 20, 170-75.

08 Finally, even Dr. Tible's March 27, 2003, seems internally inconsistent with respect to
09 which conclusions should be drawn. In that report, Dr. Tible indicated that Ms. Rymaruk had an
10 impairment that limited her ability to work or look for full-time work that would last thirty to
11 ninety days if she followed recommended treatment. She also indicated that Ms. Rymaruk's could
12 not pursue job search activities or work while in treatment, and stated "UNK" as an answer to
13 when she would be able to resume at least part-time work. However, while Dr. Tible noted that
14 Ms. Rymaruk suffered daily migraines, she answered "NO" as to whether Ms. Rymaruk should
15 pursue long-term disability benefits such as SSI. AR. 236-38.

16 Because subsequent reports submitted by Dr. Tible were in fact rendered in check-the-box
17 format with little supporting narrative, because they contained internal inconsistencies and
18 inconsistencies with the initial report, and because the adverse credibility determination about the
19 plaintiff was supported by the record, the ALJ's decision to give credence to Dr. Tible's earlier
20 medical report rather than the subsequent reports was not erroneous.

21 2. Dr. Caratao.

22 Efren R. Caratao, M.D., examined plaintiff on December 19, 2001, and determined that
23 her migraines resulted in a "moderate" impairment. AR. at 168-69. He then determined she would
24 be limited to "sedentary" work but would be unlikely to work even half-time for at least twenty
25 weeks. AR. at 169. As noted above, Dr. Tible's initial assessment of Ms. Rymaruk was that she
26 could perform "light work." Nontreating physicians, Drs. Virji and Smith, also rated her capable

01 of “light work.” AR. 170-75. The plaintiff alleges that the ALJ erred because Dr. Caratao’s
02 assessment of the plaintiff as a treating physician was not accorded proper weight.

03 An opinion of a nonexamining medical advisor cannot by itself constitute substantial
04 evidence that justifies the rejection of the opinion of an examining or treating physician, as the
05 plaintiff contends. *Lester*, 81 F.3d 821, 830-31. However, the Ninth Circuit has upheld the
06 Commissioner’s rejection of a treating physician’s opinion based in part upon the testimony of a
07 nontreating, nonexamining medical advisor when conflicts in medical testimony were present and
08 adverse credibility determinations are sustained. *Morgan*, 169 F.3d at 602.

09 In this case, the ALJ determined that Dr. Caratao’s opinion that Ms. Rymaruk was limited
10 to the “sedentary” work level was inconsistent with his determination that her migraine headaches
11 were of only “moderate” severity. He also found that this rating level was inconsistent with other
12 medical reports and with exertional levels regarding household activities undertaken by the
13 plaintiff. This conclusion was bolstered by his adverse credibility determination regarding the
14 plaintiff. The ALJ’s determination in this regard is supported by substantial evidence. As a result,
15 it must be accepted by this Court. *See Thomas*, 278 F.3d at 954.

16 *D. The ALJ did not err by failing to call the vocational expert to testify.*

17 Plaintiff relies upon the Social Security Administration’s *Hearings, Appeals and Litigation*
18 *Law Manual* (“HALLEX”) to argue that the ALJ erred at step four by failing to call a vocational
19 expert (“VE”) to clarify the vocational impact of her non-exertional impairments on her ability to
20 perform past relevant work. Dkt. No. 19 at 8-10. She argues that failure to do so constitutes
21 reversible error. *Id.*

22 1. Reliance on HALLEX.

23 Plaintiff’s reliance on HALLEX to require the ALJ to call a VE is misplaced because it is
24 an internal manual with no binding legal force. *Moore v. Apfel*, 216 F.3d 864, 868 (9th Cir. 2000).
25 Nothing suggests that an ALJ’s failure to comply with HALLEX invalidates the agency’s action
26 or requires remand. Moreover, the provision cited by plaintiff is merely permissive. Dkt. No. 19

01 at 9. Thus, even if the ALJ failed to properly call on a VE in accord with HALLEX, failure to do
02 so should be treated as harmless error and no remand granted on that basis alone.

03 2. Duty to Call a Vocational Expert.

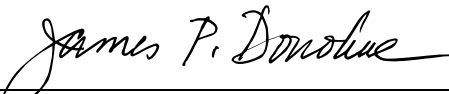
04 Plaintiff's reliance on Ninth Circuit cases for the proposition that an ALJ must obtain VE
05 testimony in order to determine the impact of non-exertional impairments on her ability to perform
06 past work is misplaced. The testimony of a VE is not required at step four of the disability
07 evaluative process, but may be needed *after* the burden of proof shifts to the Commissioner at step
08 five. *Social Security Law & Practice, Hearing Procedures* § 52.91 (West 1999); *Thomas*, 278
09 F.3d at 955 (indicating that when the burden shifts at step five, the Commissioner may meet it by
10 calling a vocational expert).

11 Here, the cases cited by plaintiff all address the use of a VE in connection with a step five
12 determination of whether a claimant could perform other work. Dkt. No. 9 at 9. The ALJ,
13 however, determined at step four that plaintiff was capable of performing her past relevant work
14 and therefore did not proceed to step five. AR. at 23. There was no obligation for an ALJ to call
15 a VE at step four and, because he found plaintiff capable of performing past relevant work, he was
16 not obligated to proceed to step five. 20 C.F.R. § 404.1520(f); *Crane*, 76 F.3d at 255. While
17 there is no doubt that the VE testimony would have made for a more complete record, and while
18 it appears that it might have been better practice to receive the evidence because the VE was
19 present at the hearing, the issue before the Court is not a best practices issue. Rather, the question
20 is whether the failure to call the VE constitutes reversible error when the determination has been
21 made at step four of the evaluation process that there is no disability. It does not.

22 VIII. CONCLUSION

23 Accordingly, I recommend that the final decision of the Commissioner be affirmed and that
24 the appeal be dismissed. A proposed Order accompanies this Report and Recommendation.

01 DATED this 16th day of May, 2005.

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05 JAMES P. DONOHUE
06 United States Magistrate Judge
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